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LAW OF WAR TREATY UPDATE

REFERENCES

1. Hague Convention No. IV, 18 October 1907, Respecting the Laws and Customs of War on Land, T.S. 539, including the regulations thereto [hereinafter H. IV].
2. Hague Convention No. IX, 18 October 1907, Concerning Bombardment by Naval Forces in Time of War, 36 Stat. 2314 [hereinafter H. IX].
3. Geneva Convention, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31 [hereinafter GWS].
4. Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members, August 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.S.T.S. 85 [hereinafter GWS Sea].
5. Geneva Convention, Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135 [hereinafter GPW].
6. Geneva Convention, Relative to the Treatment of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287 [hereinafter GC].
7. The 1977 Protocols Additional to the Geneva Conventions, December 12, 1977, 16 I.L.M. 1391, DA Pam 27-1-1 [hereinafter GP I & II].
8. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 [hereinafter 1925 Geneva Protocol].
9. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, January 13, 1993, 32 I.L.M. 800 [hereinafter 1993 CWC].
10. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 216 [hereinafter 1954 Cultural Property Convention].
11. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, April 10, 1972, 26 U.S.T. 583 [hereinafter 1972 Biological Weapons Convention].
12. Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, October 10, 1980, 19 I.L.M. 1523 [hereinafter 1980 Conventional Weapons Treaty].
13. Dep't of the Army, Field Manual 27-10, The Law of Land Warfare (July 1956) [hereinafter FM 27-10].
14. Dep't of the Navy, Naval Warfare Publication 1-14M/U.S. Marine Corps MCPW 5-2.1, The Commander's Handbook on the Law of Naval Operations (October 1995) [hereinafter NWP 1-14M].
15. Dep't of the Air Force, Air Force Publication 110-31, International Law--The Conduct of Armed Conflict and Air Operations (19 November 1976) [hereinafter AFP 110-31].
16. Dep't of Defense Instruction 5000.1, Defense Acquisition (15 March 1996) [hereinafter DoD Instr. 5000.1].

I. WEAPONS/TREATY UPDATE

- A. “The rights of belligerents to adopt means of injuring the enemy is not unlimited.” (HR, art. 22.)

- B. Legal Review. All U.S. weapons and weapons systems must be reviewed by the service TJAG for legality under the law of war. (DoD Directive 5000.1, “Defense Acquisition,” of March 15, 1996, para. D2j., AR 27-53, and SECNAVINST 5711.8A.) A review occurs before the award of the engineering and manufacturing development contract and again before the award of the initial production contract. (DoD Directive 5000.1, para. D2j.) Legal review of new weapons required also under Article 36 of GP I.
 - 1. The Test. Is the acquisition and procurement of the weapon consistent with all applicable treaties, customary international law, and the law of armed conflict? (DoD Directive 5000.1, “Defense Acquisition,” of March 15, 1996, para. D2j.) In the TJAG reviews, the discussion will often focus on whether the suffering occasioned by the use of the weapon is needless, superfluous, or grossly disproportionate to the advantage gained by its use?

 - 2. Weapons may be illegal:
 - a. Per se. Those weapons calculated to cause unnecessary suffering, determined by the “usage of states.” Examples: lances with barbed heads, irregular shaped bullets, projectiles filled with glass. (FM 27-10, para. 34.)

 - b. By improper use. Using an otherwise legal weapon in a manner to cause unnecessary suffering. Example: a conventional air strike against a military objective where civilians are nearby vs. use of a more precise targeting method that is equally available - if choice is made with intent to cause unnecessary suffering.

 - c. By agreement or prohibited by specific treaties. Example: certain land mines, booby traps, and laser weapons are prohibited under the Protocols to the 1980 Conventional Weapons Treaty.

- C. Small Arms Projectiles. Must not be exploding or expanding projectiles. The Declaration of St. Petersburg of 1868 prohibits exploding rounds of less than 400 grams (14 ounces). Prohibited by late 19th century treaties (of which US was never a party). US practice, however, accedes to this prohibition as being customary international law. State practice is to use jacketed small arms ammunition (which reduces bullet expansion on impact).
1. Hollow point ammunition. Typically, this is semi-jacketed ammunition that is designed to expand dramatically upon impact. This ammunition is prohibited for use in armed conflict by customary international and the treaties mentioned above. There are situations, however, where use of this ammunition is lawful because its use will significantly reduce collateral damage to noncombatants and protected property (hostage rescue, aircraft security).
 2. High Velocity Small Caliber Arms
 - a. Early controversy about M-16 causing unnecessary suffering.
 - b. "Matchking" ammunition. Has a hollow tip--but is not expansive on impact. Tip is designed to enhance accuracy only and does not cause unnecessary suffering.
 3. Sniper rifles, .50 caliber machine guns, and shotguns. Much "mythology" exists about the lawfulness of these weapon systems. Bottom line: they are lawful weapons, although rules of engagement (policy and tactics) may limit their use.
- D. Fragmentation (FM 27-10, para 34.)
1. Legal unless used in an illegal manner (on a protected target or in a manner calculated to cause unnecessary suffering).
 2. Unlawful if fragments are undetectable by X-ray (Protocol I, 1980 Conventional Weapons Treaty).
- E. Landmines and Booby Traps. Lawful if properly used, however, international process underway to outlaw all antipersonnel land mines.

1. Indiscriminate. Primary legal concern: indiscriminate use that endangers civilian population. Articles 4 and 5, Protocol II of the 1980 Conventional Weapons Treaty restricts placement of mines and booby traps in areas of "civilian concentration", when combat between ground forces is not on-going or imminent.
 - a. Remotely delivered mines (those planted by air, artillery etc.). Only used against military objectives; and then so only if their location can be accurately recorded or if they are self-neutralizing.
 - b. Non-remotely delivered mines, booby traps, and other devices. Can't be used in towns or cities or other places where concentrations of civilians are present, unless:
 - (1) they are placed in the vicinity of a military objective under the control of an adverse party; or
 - (2) measures are in place to protect civilians from their effects (posting of signs etc.).
2. Booby Traps. Protocol II of the 1980 Conventional Weapons Treaty also prohibits use of booby traps on the dead, wounded, children's toys, medical supplies, and religious objects (art. 6).
3. Amended Protocol II (Mines Protocol). The President transmitted the ratification package on amended Protocol II, to the Senate on 7 January 1997. (1) Expands the scope of the original Protocol to include internal armed conflicts. (2) Requires that all remotely delivered APL be equipped with self-destruct devices and backup self-deactivation features. (3) Requires that all nonremotely delivered APL not equipped with such devices ("Dumb Mines") be used within controlled, marked, and monitored minefields. (Falls short of Presidents APL policy statement of 16 May 1996 that prohibited U.S. military use of "Dumb" APL except in the Korean Peninsula and in training. (4) Requires that all APL be detectable using available technology. (5) Requires that the party laying mines assume responsibility to ensure against their irresponsible or indiscriminate use. Provides for means to enforce compliance. In his letter of Transmittal, the President emphasizes his continued commitment to the elimination of all APL.

4. U.S. policy on anti-personnel land mines. U.S. forces may no longer employ "dumb" (those that do not self-destruct or self-neutralize) anti-personnel land mines, according to a 16 May 1996 policy statement issued by the President. Exceptions to this policy:
 - a. Use of "dumb" mines on the Korean Peninsula to defend against and armed attack across the DMZ; and
 - b. Use of "dumb" mines for training purposes.
5. Ottawa Process. Initiated by the Canadian Foreign Minister. One hundred nations and assorted NGOs met in Oslo, Norway in September 1997 to draft the Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines (APL) and on Their Destruction. The Convention was signed in Ottawa, Canada in December 1997. As of March 1998, 124 nations had signed the convention and 5 had ratified it. Although the U.S. joined the Process in September of 1997, it withdrew when other countries would not allow exceptions for the use of APL mines in Korea and other uses of smart APL.
6. U.S. Developments. On 17 September 1997, the President announced the following U.S. initiatives in regards to anti-personnel land mines:
 - a. Develop alternatives to APL by the year 2003, field them in South Korea by 2006.
 - b. Appointed a Presidential advisor on land mines.
 - c. Pursue a ban on APL through the U.N. Conference on Disarmament.
 - d. Increase demining programs.
7. APL moratorium. Section 580 of the Foreign Operations Authorization Act of 1996 (110 Stat. 751) would have established a moratorium on the use of antipersonnel land mines for one year beginning 12 February 1999. Section 1236 of the FY 99 Authorization Act repeals Section 580, no moratorium will take place.

- F. Incendiaries. (FM 27-10, para. 36.) Examples: Napalm, flame-throwers, tracer rounds, and white phosphorous. None of these are illegal per se or illegal by treaty. The only U.S. policy guidance is found in paragraph 36 of FM 27-10 which warns that they should "not be used in such a way as to cause unnecessary suffering." (See also para 6-7, AFP 110-31.)
1. Napalm and Flamethrowers. Designed for use against armored vehicles, bunkers, and built-up emplacements.
 2. White phosphorous. Designed for igniting flammable targets such as fuel, supplies, and ammunition and for use as a smoke agent. White phosphorous (Willy Pete) artillery and mortar ammunition is often used to mark targets for aerial bombardment.
 3. Protocol III of the 1980 Conventional Weapons Convention. Prohibits use of air-delivered incendiary weapons on military objectives located within concentrations of civilians. Has not been ratified by the U.S. The U.S. is currently considering ratifying the protocol - with a reservation that incendiary weapons may be used within areas of civilian concentrations, if their use will result in fewer civilian casualties. For example: the use of incendiary weapons against a chemical munitions factory in a city could cause fewer incidental civilian casualties. Conventional explosives would probably disperse the chemicals, where incendiary munitions would burn up the chemicals.
- G. Lasers. US Policy (announced by SECDEF in Sep. 95) prohibits use of lasers specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision. Recognizes that collateral or incidental may occur as the result of legitimate military use of lasers (rangefinding, targeting). This policy mirrors that found in Protocol IV of the 1980 Conventional Weapons Treaty (this portion not yet ratified by U.S.). The Senate is reviewing the protocol for its advice and consent for ratification.
- H. Chemical Weapons. (FM 27-10, para. 37.) Poison has been outlawed for thousands of years. Considered a treacherous means of warfare. Problem -- once unleashed it is hard to control. (HR, art. 23a.)
1. The 1925 Geneva Protocol. (FM 27-10, para 38, change 1.) Applies to all international armed conflicts.

- a. Prohibits use of lethal, incapacitating, and biological agents. Protocol prohibits use of "asphyxiating, poisonous, or other gases and all analogous liquids, materials or devices. . . ."
 - b. The U.S. considers the 1925 Geneva Protocol as applying to **both** lethal and incapacitating chemical agents.
 - c. Incapacitating Agents: Those chemical agents producing symptoms that persist for hours or even days after exposure to the agent has terminated. U.S. views riot control agents as having a "transient" effect -- and thus are NOT incapacitating agents. Therefore, their use in war is not prohibited by the treaty. (Other nations disagree with interpretation.) There are, however, policy limitations that are discussed below.
 - d. Under the Geneva Protocol of 1925 the U.S. reserved right to use lethal or incapacitating gases if the other side uses them first. (FM 27-10, para. 38b, change 1.) Presidential approval required for use. (E.O. 11850, 40 Fed. Reg. 16187 (1975); FM 27-10, para. 38c, change 1.) HOWEVER THE US RATIFIED THE CHEMICAL WEAPONS CONVENTION (CWC) IN 1997. THE CWC DOES NOT ALLOW THIS "SECOND" USE.
 - e. Riot Control Agents. U.S. has an understanding to the Treaty that these are not prohibited.
2. Riot Control Agents (RCA). U.S. RCA Policy is found in Executive Order 11850. Applies to use of Riot Control Agents and Herbicides; requires Presidential approval before first use in an armed conflict. (However, see paragraph "3b" below, concerning the 1993 Chemical Weapons Convention's prohibition against the use of RCA as a "method of warfare.")
- a. Riot Control Agents: renounces first use in armed conflicts except in defensive military modes to save lives such as:
 - (1) controlling riots;
 - (2) dispersing civilians where the enemy uses them to mask or screen an attack;

- (3) rescue missions for downed pilots, escaping PWs, etc.; and
 - (4) for police actions in our rear areas.
 - b. Oleoresin Capsicum Pepper Spray (OC) a/k/a Cayenne Pepper Spray: U.S. classifies OC as a Riot Control Agent. (DAJA-IO, Information Paper of 15 August 1996, Use of Oleoresin Capsicum (OC) Pepper Spray and other Riot Control Agents (RCAs); DAJA-IO Memo of 20 September 1994, Subject: Request for Legal Review - Use of Oleoresin Capsicum Pepper Spray for Law Enforcement Purposes; CJCS Memo of 1 July 1994, Subject: Use of Riot Control Agents.)
3. 1993 Chemical Weapons Convention (CWC) (ref. 9). This treaty was ratified by U.S. and came into force in April 1997.
- a. Provisions (twenty four articles).
 - (1) Article I. Parties agree to never develop, produce, stockpile, transfer, use, or engage in military preparations to use chemical weapons. Retaliatory use (second use) not allowed; significant departure from 1925 Geneva Protocol. Requires destruction of chemical stockpiles. Each party agrees not to use Riot Control Agents (RCAs) as a “method of warfare.”
 - (2) Article II. Definitions of chemical weapons, toxic chemical, RCA, and purposes not prohibited by the convention.
 - (3) Article III. Requires parties to declare stocks of chemical weapons and facilities they possess.
 - (4) Articles IV and V. Procedures for destruction and verification, including routine on-site inspections.
 - (5) Article VIII. Establishes the Organization for the Prohibition of Chemical Weapons (OPWC).

- (6) Article IX. Establishes “challenge inspection”, a short notice inspection in response to another party’s allegation of non-compliance.

b. RCA Controversy. Convention prohibits RCA use as “method of warfare.” “Method of warfare” may be interpreted to include any actions that involve combatants - including traditional hostage rescue/SAR missions and human shield scenarios previously allowed by EO 11850.

- (1) The rationale for the prohibition - we do not want to give states the opportunity for subterfuge. Keep all chemical equipment off the battlefield, even if it is supposedly only for use with RCA. Secondly, we do not want an appearance problem - with combatants confusing RCA equipment as equipment intended for chemical warfare. EO 11850 is still in effect and RCA can be used in certain defensive modes with presidential authority. However, any use in which “combatants” may be involved will most likely not be approved

- (2) The Senates resolution of advice and consent for ratification to the CWC (S. Exec. Res. 75 - Senate Report, s3373 of 24 April 1997, section 2- conditions, (26) - riot control agents) required that the President must certify that the U.S. is not restricted by the CWC in its use of riot control agents, including the use against “combatants” in any of the following cases:

- (a) when the U.S. is not a party to the conflict
- (b) in consensual (Chapter VI, UN Charter) peacekeeping, and
- (c) in Chapter VII (UN Charter) peacekeeping.

- (3) The implementation section of the resolution requires that the President not modify E.O. 11850. (*see* S. Exec Res. 75, section 2 (26)(b), s3378)

- (4) The Presidents certification document of 25 April 1997 states that “the United States is not restricted by the convention in its use of riot control agents in various peacetime and peacekeeping operations. These are situations in which the U.S. is not engaged in the use of force of a scope, duration, and intensity that would trigger the laws of war with respect to U.S. forces.”
 - (5) Thus, during peacekeeping missions (such as Bosnia, Somalia, Rwanda and Haiti) it appears U.S. policy will maintain that we are not party to the conflict for as long as possible. Therefore RCA would be available for all purposes under E.O. 11850. However, in armed conflicts (such as Desert Storm, Panama, and Grenada) it is unlikely that the NCA will approve the use of RCA in situations where “combatants” are involved due to the CWC’s prohibition on the use of RCA as a “method of warfare.” (Thus, use of RCA unlikely in the CSAR and the human shield situations used as examples of defensive modes under E.O. 11850 .)
- I. Herbicides. E.O. 11850 renounces first use in armed conflicts, except for domestic uses and to control vegetation around defensive areas. (e.g., Agent Orange in Vietnam.)
- J. Biological. The 1925 Geneva Protocol prohibits bacteriological methods of warfare. The 1972 Biological Weapons Convention (ref. 11) supplements the 1925 Geneva Protocol and prohibits the production, stockpiling, and use of biological and toxin weapons. U.S. renounced all use of biological and toxin weapons.
- K. Nuclear Weapons. (FM 27-10, para. 35.) Not prohibited by international law. On 8 July 1996, the International Court of Justice (ICJ) issued an advisory opinion that "There is in neither customary nor international law any comprehensive and universal prohibition of the threat or use of nuclear weapons." However, by a split vote, the ICJ also found that "The threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict." The Court stated that it could not definitively conclude whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self defense, in which the very survival of the state would be at stake. (35 I.L.M. 809 (1996).)

II. TACTICS

- A. Psychological operations. Gulf War - US PSYOPS leaflet program - PSYOPS units distributed over 29 million leaflets to Iraqi forces. The themes of the leaflets were the "futility of resistance; inevitability of defeat; surrender; desertion and defection; abandonment of equipment; and blaming the war on Saddam Hussein." It was estimated that nearly 98% of all Iraqi prisoners acknowledged having seen a leaflet; 88% said they believed the message; and 70% said the leaflets affected their decision to surrender." Adolph, *PSYOP: The Gulf War Force Multiplier*, Army Magazine 16 (December 1992).

- B. Ruses. (FM 27-10, para. 48). Injuring the enemy by legitimate deception (abiding by the law of war--actions are in good faith). Examples of Ruses.

1. Naval Tactics. A common naval tactic is to rig disguised vessels or dummy ships, e.g., to make warships appear as merchant vessels. Some examples follow:

World War I - Germany: Germany often fitted her armed raiders with dummy funnels and deck cargoes and false bulwarks. The German raider Kormoran passed itself off as a Dutch merchant when approached by the Australian cruiser Sydney. Once close enough to open fire she hoisted German colors and fired, sinking Sydney with all hands. See C. John Colombos, *The International Law of the Sea* 454-55 (1962).

World War II - Britain: British Q-ship program during WWII. The British took merchant vessels and outfitted them with concealed armaments and a cadre of Royal Navy crewmen disguised as merchant mariners. When spotted by a surfaced U-boat, the disguised merchant would allow the U-boat to fire on them, then once in range, the merchant would hoist the British battle ensign and engage the U-boat. The British sank 12 U-boats by this method. This tactic caused the Germans to shift from surfaced gun attacks to submerged torpedo attacks. LCDR Mary T. Hall, *False Colors and Dummy Ships: The Use of Ruse in Naval Warfare*, Nav. War. Coll. Rev., Summer 1989, at 60.

2. Land Warfare. Creation of fictitious units by planting false information, putting up dummy installations, false radio transmissions, using a small force to simulate a large unit. (FM 27-10, para. 51.) Some examples follow:

World War II - Allies: The classic example of this ruse was the Allied Operation Fortitude prior to the D-Day landings in 1944. The Allies, through the use of false radio transmissions and false references in bona

fide messages, created a fictitious First US Army Group, supposedly commanded by General Patton, located in Kent, England, across the English Channel from Calais. The desire was to mislead the Germans to believe the cross-Channel invasion would be there, instead of Normandy. The ruse was largely successful. John Keegan, *The Second World War* 373-79 (1989).

Gulf War - Coalition: Coalition forces, specifically XVIII Airborne Corps and VII Corps, used deception cells to create the impression that they were going to attack near the Kuwaiti boot heel, as opposed to the "left hook" strategy actually implemented. XVIII Airborne Corps set up "Forward Operating Base Weasel" near the boot heel, consisting of a phony network of camps manned by several dozen soldiers. Using portable radio equipment, cued by computers, phony radio messages were passed between fictitious headquarters. In addition, smoke generators and loudspeakers playing tape recorded tank and truck noises were used, as were inflatable Humvees and helicopters. Rick Atkinson, *Crusade*, 331-33 (1993).

3. Use of Enemy Property. Enemy property may be used to deceive under the following conditions:
 - a. Uniforms. Combatants may wear enemy uniforms but cannot fight in them. Note, however, that military personnel not wearing their uniform lose their PW status if captured and risk being treated as spies (FM 27-10, para. 54, 74; NWP 1-14M, para. 12.5.3; AFP 110-31, 8-6.)

World War II - Germany: The most celebrated incident involving the use of enemy uniforms was the Otto Skorzeny trial arising from activities during the Battle of Bulge. Otto Skorzeny was brigade commander of the 150th SS Panzer Brigade. Several of his men were captured in US uniforms, their mission being to secure three critical bridges in advance of the German attack. 18 of Skorzeny's men were executed as spies following the battle. Following the war, ten of Skorzeny's officers, as well as Skorzeny himself, were accused of the improper use of enemy uniforms, among other charges. All were acquitted. The evidence did not show that they actually fought in the uniforms, consistent with their instructions. The case generally stands for the proposition that it is only the fighting in the enemy uniform that violates the law of war. (DA Pam 27-161-2 at 54.)

For listing of examples of the use of enemy uniforms see W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. Rev. 1, 77-78 (1990).

For an argument against any use of the enemy's uniform see Valentine Jobst III, *Is the Wearing of the Enemy's Uniform a Violation of the Laws of War?*, 35 Am. J. Int'l L. 435 (1941).

- b. Colors. The U.S. position regarding the use of enemy flags is consistent with its practice regarding uniforms, i.e., the US interprets the "improper use" of a national flag (HR, art. 23(f).) to permit the use of national colors and insignia of enemy as a ruse as long as they are not employed during actual combat (FM 27-10, para. 54; NWP 1-14M, para 12.5.). Note the Protocol I position on this issue in paragraph (d) below.
 - c. Equipment. Must remove all enemy insignia in order to fight with it. Captured supplies: may seize and use if state property. Private transportation, arms, and ammunition may be seized, but must be restored and compensation fixed when peace is made. (HR, art. 53).
 - d. Protocol I. GP I, Article 39(2) prohibits virtually all use of these enemy items. (*see* NPW 1-14M, para 12.5.3.) Article 39 prohibits the use in an armed conflict of enemy flags, emblems, uniforms, or insignia while engaging in attacks or "to shield, favour, protect or impede military operations." The U.S. does not consider this article reflective of customary law. This article, however, expressly does not apply to naval warfare, thus the customary rule that naval vessels may fly enemy colors, but must hoist true colors prior to an attack, lives on. (GP I, art 39(3); NWP 1-14M, para. 12.5.1.)
- C. Use of Property. (*See, Elyce Santere, From Confiscation to Contingency Contracting: Property Acquisition on or Near the Battlefield*, 124 Mil. L. Rev. 111 (1989).) Confiscation - permanent taking without compensation; Seizure - taking with payment or return after the armed conflict; Requisition - appropriation of private property by occupying force with compensation as soon as possible; Contribution - a form of taxation under occupation law.
- D. Treachery and Perfidy. Prohibited under the law of war. (FM 27-10, para. 50; HR. art. 23b.) Perfidy involves injuring the enemy by his adherence to the law of war (actions are in bad faith).

1. Condemnation. Condemnation of perfidy is an ancient precept of the LOW - derived from principle of chivalry. Perfidy degrades the protections and mutual restraints developed in the mutual interest of all Parties, combatants, and civilians. In practice, combatants find it difficult to respect protected persons and objects if experience causes them to believe or suspect that the adversaries are abusing their claim to protection under the LOW to gain a military advantage. Thus, the prohibition is directly related to the protection of war victims. Practice of perfidy also inhibits restoration of peace. (Michael Bothe, et. al., *New Rules for Victims of Armed Conflicts*, 202 (1982); FM 27-10, para. 50.)

2. Feigning and Misuse. Distinguish feigning from misuse. Feigning is treachery that results in killing, wounding, or capture of the enemy. Misuse is an act of treachery resulting in some other advantage to the enemy. Note that in order to be a violation of GP I, Article 37 the feigning of surrender or an intent to negotiate under a flag of truce must result in a killing, capture, or surrender of the enemy. Simple misuse of a flag of truce, not necessarily resulting in one of those consequences is, nonetheless, a violation of Article 38 of Protocol I, which the U.S. also considers customary law. An example of such misuse would be the use of a flag of truce to gain time for retreats or reinforcements. Morris Greenspan, *The Modern Law of Land Warfare* 320-21 (1959). Article 38 is analogous to the Hague IV Regulation prohibiting the improper use of a flag of truce, art 23(f).

3. Protocol I. According to GP I, Article 37(1), the **killing, wounding, or capture via** "[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence [are perfidious, thus prohibited acts]." (U.S. considers customary law.) Article 37(1) does not prohibit perfidy per se, only certain perfidious acts that result in killing, wounding, or capturing, although it comes very close. The ICRC could not gain support for an absolute ban on perfidy at diplomatic conference. (Bothe, *supra*, at 203.) Article 37 also refers only to confidence in international law (LOW), not moral obligations. The latter viewed as too abstract by certain delegations. (*Id.* at 204-05.) Note, however, that the US view includes breaches of moral, as well as legal obligation as being a violation, citing the broadcasting of an announcement to the enemy that an armistice had been agreed upon when it had not as being treacherous. (FM 27-10, para 50.)

4. Feigning incapacitation by wounds/sickness. (GPI, art. 37(1)(b).) Whiteman says HR, Article 23b also prohibits this, e.g. if shamming wounds and then attacking approaching soldier. Marjorie M. Whiteman, Dep't of State, 10 *Digest of International Law* 390 (1968); NWP 1-14M, para. 12.7.
5. Feigning surrender or the intent to negotiate under a flag of truce. (GP I, Art 37(1)(a).)
 - a. Falklands War - British: During the Battle for Goose Green, some Argentinean soldiers raised a white flag. A British lieutenant and 2 soldiers went forward to accept what they thought was a surrender. They were killed by enemy fire. The incident was disputed. Apparently, one group of Argentines was attempting to surrender, but not another group. The Argentinean conduct was clearly treachery if the British soldiers were killed by those raising the white flag, but it was not treacherous if they were killed by other Argentineans either unaware of the white flag, or not wishing to surrender. This incident emphasizes the rule that the white flag is an indication of a desire to negotiate only and that its hoister has the burden to come forward. See Major Robert D. Higginbotham, *Case Studies in the Law of Land Warfare II: The Campaign in the Falklands*, Mil. Rev., Oct. 1984, at 49.
 - b. Gulf War - Battle of Khafji incident was not a perfidious act. Media speculated that Iraqi tanks with turrets pointed aft, then turning forward when action began was perfidious act. DOD Report to Congress rejected that observation, stating that the reversed turret is not a recognized symbol of surrender *per se*. "Some tactical confusion may have occurred, since Coalition ground forces were operating under a defensive posture at that time, and were to engage Iraqi forces only on a clear indication of hostile intent, or some hostile act." Dep't of Defense, *Final Report to Congress: Conduct of the Persian Gulf War* 621 (1992).
 - c. Gulf War - On one occasion, however, Iraqi forces did apparently engage in perfidious behavior. In a situation analogous to the Falklands War scenario above, Iraqi soldiers waved a white flag and also laid down their arms. As Saudi forces advanced to accept the surrender, they took fire from Iraqis hidden in buildings on either side of street. Id.

- d. Gulf War - On another occasion an Iraqi officer approached Coalition force with hands up indicating his intent to surrender. Upon nearing the Coalition forces he drew a concealed pistol, fired, and was killed. Id.
- 6. Feigning civilian, noncombatant status. "Attacking enemy forces while posing as a civilian puts all civilians at hazard." (GP I, art 37(1)(c); NWP 1-14M, para. 12.7.)
- 7. Feigning protected status by using UN, neutral, or nations not party to the conflict's signs, emblems, or uniforms. (GP I, art 37(1)(d).)
 - a. As an example, on 26 May 1995, Bosnian Serb commandos dressed in uniforms, flak jackets, helmets, weapons of the French, drove up to French position on a Sarajevo bridge in an APC with UN emblems. French forces thought all was normal. The commandos, however, then proceeded to capture French Peacekeepers without firing a shot. Joel Brand, *French Units Attack Serbs in Sarajevo*, Wash. Post, May 28, 1995, at A1.
 - b. As in the case of the misuse of the flag of truce, misuse of a UN emblem which does not result in a killing, capture, or surrender, is nonetheless, a violation of Art 38, GPI. Note, however, that this prohibition only applies if the UN force is not an actual combatant force, a condition that has only arisen on one occasion: the Korean War. Michael Bothe, *et. al.*, *New Rules for Victims of Armed Conflicts* 206 (1982).
- 8. Misuse of Red Cross, Red crescent, cultural property symbol.
 - a. Designed to reinforce/reaffirm HR, Article 23f.
 - b. GWS requires that wounded & sick, hospitals, medical vehicles, and in some cases, medical aircraft be respected and protected. Protection lost if committing acts harmful to enemy. As an example, during the Grenada Invasion, US aircraft took fire from the Richmond Hills Hospital, and consequently engaged it. (DA Pam 27-161-2, p. 53, n. 61.)

- c. Cultural property symbols include 1954 Hague Cultural Property Convention, Roerich Pact, 1907 Hague Conventions symbol. (Bothe, *supra*, at 209.)
- 9. Misuse of internationally recognized distress signals, e.g., ICAO, IMCO distress signals.
- 10. Booby Traps. Certain uses of booby-traps prohibited by the 1980 Conventional Weapons Convention would otherwise be perfidious. Under this convention, it is prohibited to booby trap dead bodies; sick and wounded; burial sites and graves; medical facilities, supplies, or transportation; and historic monuments, works of art that constitute the cultural heritage of a people.
- E. Assassination. Hiring assassins, putting a price on the enemy's head, and offering rewards for an enemy "dead or alive" is prohibited. (FM 27-10, para 31; E.O. 12333.) Targeting military leadership, however, is not assassination. See W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, Army Law. Dec. 1989, at 4.
- F. Espionage. (FM 27-10, para. 75; GP I, art. 46.) Acting clandestinely (or on false pretenses) to obtain information for transmission back to their side. Gathering intelligence while in uniform is not espionage.
 - 1. Espionage is not a law of war violation.
 - 2. No protection, however, under Geneva Conventions for acts of espionage.
 - 3. Tried under the laws of the capturing nation. E.g., Art. 106, UCMJ.
 - 4. Reaching friendly lines immunizes spy for past espionage activities. Therefore, upon later capture as a lawful combatant, past spy cannot be tried for past espionage.
- G. Reprisals. (FM 27-10, para 497.) An otherwise illegal act done in response to a prior illegal act by the enemy. The purpose of a reprisal is to get the enemy to adhere to the law of war.
 - 1. Reprisals are authorized if the following requirements are met:

- a. it's timely;
 - b. it's responsive to enemy's act;
 - c. must first attempt a lesser form of redress; and
 - d. must be proportional.
- 2. Prisoners of war and persons "in your control" can not be objects of reprisals. Protocol I prohibits reprisals against numerous targets such as the entire civilian population, civilian property, cultural property, objects indispensable to the survival of the civilian population (food, livestock, drinking water), the natural environment, installations containing dangerous forces (dams, dikes, nuclear power plants) (GP I, arts. 51-56).
 - 3. US policy is that a reprisal may be ordered only at the highest levels (NCA).

H. Rules of Engagement. Defined: Directives issued by competent superior authority that delineate the circumstances and limitations under which US forces will initiate and/or continue engagement with other forces.

- 1. ROE are drafted in part based upon the LOW. Drafted considering LOW, political policy, public opinion and military operational constraints. ROE are usually more restrictive than what the LOW would allow.
- 2. Targeting rules are often incorporated within ROE for a given operation.
- 3. JCS Standing ROE (CJCS Instruction 3121.01 dtd 1 Oct 94): Guidance as to course of action in specific situations. "Inherent Right of Self-Defense" for both individual and the unit is the foundation of document.

III. CONCLUSION

- A. Principles
- B. Targets

C. Weapons

D. Tactics